IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1371

SEABOARD COAST LINE RAILROAD COMPANY, *Petitioner*

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; F. RAY MARSHALL, Secretary of Labor, United States Department of Labor; AFL-CIO; UNITED TRANSPORTATION UNION, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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Petitioner Seaboard Coast Line Railroad Company requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 539 F.2d 387 and appears in the Appendix at pages 1a-11a. The judg-

ment appears in the Appendix at page 12a. The order of the Court of Appeals upon denial of the petition for rehearing appears in the Appendix at page 13a. The decision and order of the Occupational Safety and Health Review Commission's Administrative Law Judge appears in the Appendix at pages 14a-18a. A digest of the decision is reported at 1973-74 CCH OSHD ¶ 16,349. The decision of the Occupational Safety and Health Review Commission in this case is reported at 1974-75 CCH OSHD ¶ 19,073 and appears in the Appendix at pages 19a-21a. The Commission's decision in the companion case of *Southern Pacific* and upon which the Commission relied in this case is reported at 13 OSAHRC 258, 1974-75 CCH OSHD ¶ 19,054 (1974), and is reproduced in the Appendix at pages 22a-46a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1976, (App. p. 1a). A timely petition for rehearing was denied on January 10, 1977, (App. p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and under § 11(a) of the Occupational Safety and Health Act of 1970, 84 STAT. 1590, 29 U.S.C. § 660(a).

QUESTION PRESENTED

Has the Federal Railroad Administration exercised its "statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health" within the meaning of Section 4(b)(1) of the Occupational Safety and Health Act of 1970 so as to exempt petitioner railroad's activities complained of by OSHA in this case from coverage of that Act?

STATUTES INVOLVED

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 84 STAT. 1590, 29 U.S.C. § 653(b)(1), reads as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 254 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Section 202(a) of the Federal Railroad Safety Act of 1970, 84 STAT. 971, 45 U.S.C. § 431, reads in pertinent part as follows:

> The Secretary of Transportation (hereinafter in this title referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on the date of enactment of this title, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety . . .

STATEMENT OF THE CASE

This petition is for review of a decision of the Fifth Circuit affirming an order of the Occupational Safety and Health Review Commission which reversed the decision of its Administrative Law Judge. He had held that Seaboard Coast Line Railroad Company (SCL) was not subject to the provisions of the Occupational Safety and Health Act (OSHA) 29 U.S.C. § 651 *et seq.* because jurisdiction over railroad safety was conferred upon and exercised by the Federal Rail-

road Administration (FRA) pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421, *et seq.*

On March 28, 1975, a representative of the Secretary of Labor (Secretary) without either seeking [1] or obtaining [2] a warrant inspected SCL's Rail Reclamation facility at Savannah, Georgia, and subsequently issued a no penalty citation for failure to provide exhaust ventilation to two Nordberg rail frog grinders. Following a timely Notice of Contest by SCL, a Complaint was filed by the Secretary on May 4, 1973. With its Answer thereto, SCL filed a Motion to Dismiss for Lack of Jurisdiction which was granted on July 18, 1973, by the Administrative Law Judge (App. p. 14a).

On review the full Commission reversed the decision by a two to one vote (App. p. 19a) in reliance on its contemporaneous decision in the *Southern Pacific Transportation Company* (App. p. 22a). In the *Southern Pacific* split decision, the Commission adopted the nook and cranny theory advanced by the Secretary whereby an OSHA standard remains in effect until FRA enforces a standard on precisely the same subject. The dissenting Chairman viewed FRA activity as a whole as having triggered the exemption so as to

[1] That the Secretary must establish probable cause and obtain a search warrant prior to entry is required by the decision of *Brennan* v. *Gibson Products, Inc.*, 407 F. Supp. 154 (E. D. Tex. 1976) (Three Judge) and *Usery* v. *Centrif-Air Machine, Inc.*, No. C-76-1551, —— F. Supp. —, 1976-77 OSHD ¶ 21,478 (N. D. Ga. Jan. 10, 1977).

[2] That warrantless entry is constitutionally impermissible is established by this Court's decision in *GM Leasing Corp.* v. *United States*, No. 75-235, — U.S. —, 50 L.Ed. 2d 530 (Jan. 12, 1977), and the holding of the Three Judge Court in *Barlow's Inc.* v. *Usery*, — F. Supp. —, 4 OSHC 1887 (Ida.) which specifically struck down OSHA entry.

remove OSHA jurisdictional infringement.[3] The decision was appealed pursuant to OSHA § 11(a), 29 U.S.C. § 660(a).

In denying SCL's Petition for Review, the Court below in consolidated proceedings [4] ruled that "Section 4(b)(1) means that any FRA exercise directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard'—displaces OSHA coverage of that working condition" (App. p. 8a). The scope of the exemption was said to be "determined by FRA's intent, as derived from its articulations" (App. p. 8a). Limiting its consideration to standards in effect on the date of issuance of OSHA citations, the Court held that FRA has not exercised its authority on those working conditions which were the subjects of the orders under review (App. p. 11a).

SCL's petition for rehearing based on the effect of the Court's ruling and its failure to consider FRA activity during the pendency of the proceeding was denied on January 10, 1977 (App. p. 13a).

OSHRC review of the Administrative Law Judge decision on remand was stayed pending application for certiorari (App. pp. 47a to 49a).

[3] During the pendency of this action in the court below, an administrative hearing on the merits of the citation was held and a violation found. Commissioner Moran directed review which was stayed pending the decision by the court below.

[4] The consolidated proceedings included two petitions for review arising out af the *Southern Pacific* decision (Nos. 74-3981 and 75-1091) and the petition for review in the first *Union Pacific* case (8th Cir.) No. 75-1065, *transferred to 5th Cir. and docketed* as No. 75-1613.

REASONS FOR GRANTING THE WRIT

1. Delineation of the jurisdictional boundaries between OSHA and FRA is a matter of national importance which this Court should address in order to forestall litigation certain to occur under the conflicting and unworkable interpretations[5] rendered by the court below and by the United States Court of Appeals for the Fourth Circuit in *Southern Railway* v. *OSHRC*, 539 F.2d 335 (Feb. 9, 1976), rehearing denied (Mar. 15, 1976), reconsideration of rehearing denied (June 23, 1976), Certiorari denied, No. 76-100, — U.S. —, 45 U.S.L.W. 3410 (Dec. 6, 1976).

As recently as January 17, 1977, OSHRC Chairman Barnako noted in *Indiana Harbor Belt Ry.*[6] that there

[5] The opinion below gives examples of the confusion which will result from its holding "[A] regulatory exercise expressed in terms of a category of equipment or a generalized problem may raise questions about whether a given item is covered. Conversely, an exercise expressed in terms of a piece of equipment may create an issue about whether FRA has regulated the entire category . . . .", 539 F.2d 392 (App. p. 8a).

In the Petition for a Writ of Certiorari in Docket No. 76-100, the Secretary is quoted as describing the Fourth Circuit's "environmental area" demarcation as one which will "inevitably engender multitudinous additional litigation".

[6] OSHRC Docket No. 12420, — OSAHRC —, 1976-77 CCH OSHD ¶ 21,473 (Jan. 17, 1977). That FRA-OSHA jurisdictional delineation is in a total state of confusion is reinforced by the factual underpinnings of *Indiana Harbor Belt Ry.* The Administrative Law Judge initially overruled the railroad's motion to dismiss based on section 4(b)(1) preclusion. He reversed that action sua sponte because of the continued FRA activity. In setting aside the dismissal of the complaint, Commissioner Cleary wrote the opinion and cited "consistent Commission precedent" and the "reasoning of" the Fifth Circuit's opinion in *Southern Pacific*. Chairman Barnako concurred and Commissioner Moran dissented. Thus, the three members had three different views of section 4(b)(1) and the railroad industry.

are presently three viable definitions of the statutory term "working conditions". In addition to the interpretation of the Fourth and Fifth Circuits, Chairman Barnako cited the Commission's construction in *Southern Pacific Transportation Company.*[7]

In the instant proceeding the court below specifically distinguished[8] its "articulated intent" formula from the "environmental area" interpretation of the Fourth Circuit opinion. Both decisions will necessitate further litigation and neither should be allowed to stand as precedent for cases involving the identical issue presently pending in the Seventh and Eighth Circuits.[9]

While recognizing that the jurisdiction of OSHA is subserviant to that of FRA, the decision below nevertheless provides that OSHA jurisdiction is displaced only to the extent that a FRA regulation (or formal articulation of non-regulation) covers a "working condition", a term which

> . . . embraces both "surrounding", such as the general problem of the use of toxic liquids, and physical "hazards", which can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace).

539 F.2d at 391 (App. pp. 7a-8a).

[7] 13 OSAHRC 258 (1974).

[8] 539 F.2d at 391, n. 10, App. 8a, n. 10.

[9] These cases are *Chicago, M., St.P. & P. Ry.* v. *Occupational Safety and Health Review Commission*, 7th Cir. No. 75-2112; and *Burlington Northern Railroad* v. *Occupational Safety and Health Review Commission*, 8th Cir., No. 75-1943. In addition, the Court of Appeals for the Ninth Circuit is presently considering an appeal by the Secretary of Labor from a district court order enjoining him from inspecting another railroad's maintenance shop. *Dunlop* v. *Burlington Northern Railroad*, 395 F. Supp. 303 (D. Mont. 1975), appeal docketed, 9th Cir., No. 75-2184.

Thus, in defining the statutory term "working conditions", the court below drew upon the contractual definition of that term found in the collective bargaining agreement which this court examined in *Corning Glass Works* v. *Brennan,* 417 U.S. 188 (1974). A patent ambiguity arises in the lower court's failure to differentiate its example of the composite elements "surrounding" and " hazards" from the contractual definitions thereof:

> "Surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machines, chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing their duties."

417 U.S. at 203, n. 22.

Awaiting further litigation is whether comprehensive FRA regulations directed at a statutory "working condition" e.g. location (machine shop), would, without specific mention thereof, displace OSHA regulation of a contractual "working condition", e.g. wet or heat. The net effect is the adoption of the nook and cranny theory [10] with the caveat that specific mention of nonregulation will have the same effect as a specific regulation.

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[10] A term coined by then Chairman Moran in the OSHRC *Southern Pacific* decision, App. p. 39a to describe the Secretary's theory that an OSHA regulation remained in effect until FRA promulgates a regulation on the same subject. Commissioner Moran gave an example of its application ". . . if any Federal agency has not issued a regulation covering the configuration of toilet seats which are provided for employee use, for example, then the Department of Labor job safety standard on that subject will apply. I do not believe Congress intended a result that would lead to such absurdities." *Id.* (citation omitted).

The confusion which the Court below recognized would result from its unworkable formula [11] is compounded by that Court's refusal to consider FRA activity occurring since the date that OSHA citations were issued.[12] That approach overlooks the holding of this Court in *NLRB* v. *Jones-Laughlin Steel Corp.,* 331 U.S. 416 (1947), that an intervening material change of circumstances should be included in the *ratio decidendi* or constitute grounds for remand to the agency for its further consideration. This matter assumes crucial importance in the instant case because of the publication on July 15, 1976 (41 Fed. Reg. 29153) of the FRA general duty clause:

> § 221.9 Responsibility of Railroads (a) Each railroad shall—
>
> (1) Furnish its employees employment and place of employment which are free from recognized hazards which are causing or are likely to cause death or serious physical harm to its employees. . .

The lower court's opinion addresses a question of first impression on defining the jurisdictions of OSHA and FRA. Other matters aside, failure to speak on the impact of the FRA general duty clause deprives the litigants of resolution of their controversy. This FRA

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[11] See note 5, *supra.*

[12] Since July 15, 1976, the FRA's "exercise" of its jurisdiction has been evidenced by publications appearing in the Federal Register on July 26, 1976 [41 Fed. Reg. 30649]; Oct. 26, 1976 [41 Fed. Reg. 46853]; Nov. 2, 1976 [41 Fed. Reg. 48126]; Nov. 17, 1976 [41 Fed. Reg. 50701]; Nov. 22, 1976 [41 Fed. Reg. 51429]; Dec. 29, 1976 [41 Fed. Reg. 56678 and 56679]; Jan. 11, 1977 [42 Fed. Reg. 2318 and 2321]; Jan. 21, 1977 [42 Fed. Reg. 3843]; January 27, 1977 [42 Fed Reg. 5059 and 5065] and March 10, 1977 [42 Fed. Reg. 13309].

"articulation of intent" does not fit into the lower court's formula that, "any FRA exercise directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard' displaces OSHA coverage of that working condition". Failure to decide whether the OSHA general duty clause is displaced mandates further litigation.

Furthermore, the opinion below cites as an example of total OSHA displacement "comprehensive treatment of the general problem of railroad fire protection". Yet, the opinion does not cite the promulgation on July 15, 1976, of regulations dealing with fire protection, 41 Fed. Reg. 29153. Awaiting further litigation is the sufficiency of the regulations published prior to rendition of that decision.

Hypothecation as to what Congress might have written rather than enforcement of what was written has resulted in an abhorrent situation described succinctly by the D. C. Circuit:

> It is unquestionably true that, as petitioners understandably lament, the Congressional scheme fixed upon in this instance is visibly pregnant with dangers of duplication and overlapping assertions of authority by competing federal agencies.

Baltimore & O. R.R. v. *OSHRC,* No. 75-2163, slip op. at 7, — U.S. App. D.C. —, F.2d — (Dec. 30, 1976). These perceptive words are particularly incisive because of the enunciated Congressional purpose to avoid duplicative regulation.

That the Fifth Circuit in this proceeding expressed sympathy for the railroad's plight offers no solace nor does the suggestion that FRA enumerate each of OSHA regulations which are displaced. The existence

of more than 3400[13] pages of OSHA regulations imposes a Sisyphean task on FRA and imprisons the nation's railroads in the labyrinth of Daedalus.

2. The Court below sentenced America's railroads to perpetual regulation by two Federal agencies in contravention of the nearly century old[14] national policy of parallel nonduplicative regulation of safety and health in the railroad industry. This drastic departure from the preexisting regulatory scheme was taken without the clearly expressed congressional mandate required by this Court's decision in *Train* v. *Colorado Public Interest Research Group,* — U.S. —, 48 L.Ed. 2d 343, 439 (1976).[15] Indeed the anomalous conclusions below were reached despite repeated manifesta-

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[13] Chairman Moran notes such a volume of OSHA regulations and standards. *Southern Pacific* [App. p. 44a]. Congress has been informed that "the Library of Congress has only about 70 percent of the standards". *Hearing on Oversight and Proposed Amendments of Occupational Safety and Health Act of 1970* (House Select Subcommittee on Labor, Committee on Education and Labor), 92nd Congress, 2d Session, at p. 45 (Comm. Print) (1973).

[14] The first national safety and health legislation was the Safety Appliance Act of March 2, 1893, c. 196, 27 STAT. 531, codified as 45 U.S.C. §§ 1-6. Its progeny and the evolution of railroad safety legislation are discussed in *Edwards,* "Safety and Health Regulation of the Transportation Industry: Can the Industry Serve Two Masters?" ICC PRACT. J. 614 (July-Aug. 1976). *See generally,* DOT Act of 1966, 49 U.S.C. § 1655, PUB. L. 89-670, 80 STAT. 931 (1966) at §§ 6(e-f), (i), 1966 U.S. Code Cong. & Adm. News 1110-1112.

[15] Although addressing a question of first impression, the Court below also disregarded and made no mention of the holdings in *National Ass'n of Regulatory Utility Comm'rs.* v. *Coleman,* — F.2d —, 12 CCH OSHD ¶ 21,308 (3d Cir. 1976) or *Organized Migrants in Community Action* v. *Brennan,* — U.S. App. D.C. —, 520 F.2d 1161 (D.C. Cir. 1975).

tions [16] of congressional intent to exempt the heavily regulated railroad industry from the coverage of the Occupational Safety and Health Act [17] [OSHA].

The crucial issue—the only issue—before the lower court was to determine what Congress intended to be the scope of the jurisdictional exemption in section 4(b)(1) of OSHA and how that section affected the railroad industry which is subject to its own regulatory agency and an evergrowing set of safety and health standards. The court reached a conclusion which frustrates legislative intent and implies that our legislators "had no sense of order and intended to create confusion" [18] by passing both OSHA and FRSA [19] in the same session of Congress. The statutory language at issue is that of OSHA section 4(b)(1):

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2021], exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.[20]

Hence the statutory language, incorporating three disjunctive clauses: "prescribe or enforce"; "standards

[16] Discussed *infra* at p. 14 and following.

[17] 29 U.S.C. §§ 651 *et seq.*, PUB. L. 91-596, 84 STAT. 1592 (1970).

[18] Moran, Chmn., OSHRC, dissenting in *Southern Pacific*, 13 OSHRC 258, App. at 46a.

[19] Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 21 *et. seq.* PUB. L. 91-458, 84 STAT. 971 (1970).

[20] 29 U.S.C. § 653(b)(1); PUB. L. 91-596, 84 STAT. 1593 (1970).

or regulations"; and "safety or health", is on its face a broad proviso which appears to preclude OSHA coverage so long as another Federal or State agency "exercises statutory authority" in those broad areas.

In abrogating its judicial function "to apply [the statute] on the basis of what Congress has written, rather than on the basis of what Congress might have written," [21] the court below befriended strange bedfellows: For example: as grounds for discounting the specific remarks of the House bill's sponsor that preemption would be invoked when another agency was in the "formulative stages of regulations or enforcement" [22] the opinion below cited remarks inserted into the Congressional Record three days before oral argument.[23] Similarly, in addressing the "structure of section 4(b)(1)" the court views as "the anthesis of an industry-wide exemption" the reference to 42 U.S.C. § 2021 whereby certain regulation of the atomic energy industry is "explicitly left to the States." [24] The weakness of the lower court's analysis is evidenced by the fact that in neither the briefs nor oral argument was the reference to 42 U.S.C. § 2021 raised. The error involved in relying upon that analysis is the failure to recognize the difference between the long established tradition of duplicative state and federal regulation under the Atomic Energy Act and the plethora of deci-

[21] *United States* v. *Great Northern Ry.*, 343 U.S. 562, 575 (1972).

[22] App. at 10a, citing 116 Cong. Rec. 38,373 (daily ed. Nov. 23, 1970) (remarks of Cong. Steiger).

[23] App. at 10a, n. 12. Citing 121 Cong. Rec. 21,261 (daily ed. Dec. 5, 1975) (remarks of Sen. Williams).

[24] App. at 5a.

sions by this Court denying such dual regulation of the railroad industry.[25]

The lower court justifies its disregard for many specific statements in the legislative history by enunciating preferential reliance on "the legislative process—the process by which Congress arrived at the statutory language," 539 F.2d at 391, App. at 6a-7a. However, examination of the legislative process buttresses SCL's position that congressional intent cannot be harmonized with the opinion below.

Concern for employee safety and health emerged as a major and consistent congressional policy for the first time in the 1960's [26] and resulted in three statutes which focused upon the problems of a specific industry.[27] The Federal Railway Safety Act [28] [FRSA] was the third and under its mandate, the Secretary of Transportation is to "prescribe as necessary, appro-

[25] *E.g.* In *Napier* v. *Atlantic Coast Line Railroad*, 272 U.S. 605, 613 (1926), this Court addressed a conflict between state and federal railroad regulation. The states claimed their regulations sought to prevent "sickness and disease" whereas the federal scheme covered only "accidental injury". Mr. Justice Brandeis spoke for the Court in holding that the lack of "specific exercise" was "without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing on the construction of the act delegating the power." Thus, the "broad scope of the authority conferred upon the commission" compelled the holding that Congress had "intended to occupy the field" of regulating locomotive equipment.

[26] *Burton*, "The Occupational Safety and Health Act," 23 LAB. L. J. 501 (1973).

[27] The first such comprehensive industrial safety statute was adopted in 1966 as the Metal and Nonmetallic Mine Saftey Act, 30 U.S.C. §§ 721 *et seq.* PUB. L. 89-577, 80 STAT. 722 (1966). Three years thereafter, Congress unified and greatly expanded prior piecemeal coverage of the nation's coal mines by enactment of the Coal Mines Health and Safety Act of 1969, 30 U.S.C. §§ 801 *et seq.*, PUB. L. 91-173, 83 STAT. 742 (1969).

[28] 45 U.S.C. §§ 21 *et seq.*, PUB. L. 91-458, 84 STAT. 971 (1970).

priate rules, regulations, orders and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970." [29] Thus, Congress provided for the last area of specific concern—the railroad industry—prior to addressing the safety and health problems of those workers in general industry who were neither miners nor railroad employees. The result was the Occupational Safety and Health Act of 1970.

The "legislative process" and the legislative history manifest the congressional intent to exclude from OSHA coverage those industries regulated under other federal safety and health legislation. The original bills [30] in both the Senate [31] and the House [32] would

[29] FRSA § 202(a)(1), 45 U.S.C. § 431(a)(1).

[30] S. 2193, the so-called "Williams Bill" was the first legislation introduced in the Senate's OSHA debates, and was similar to H.R. 3809 (the "O'Hara bill"), which had not progressed beyond a first hearing. The Administrative proposals were contained in H.R. 13373 and S. 2788, both introduced in August, 1969. OSHA, as passed, consists of an amalgam of S. 2193 and H.R. 16785, the "Daniels Bill", (which relied heavily on H.R. 3809) and H.R. 19200, the Administration-backed "Steiger-Sikes compromise"; the majority of its substantive provisions are based on S. 2193. Other OSHA bills introduced in the 91st Congress included the "Hathaway bill" H.R. 843 (Jan. 3, 1969), and the "Perkins bill" H.R. 4294 (Jan. 23, 1969), which died in committee; and the "Dominick bill" S. 4404 (a counterpart of H.R. 19200), which was tabled by a close vote on November 16, 1970.

[31] Originally, section 12 of S. 2193 would have allowed the Secretary of Labor to repeal and rescind health and safety standards prescribed under other Federal law by promulgating his own regulations applicable to the same industry. However, he could have left the standards of the other agency in effect.

[32] The original House bill (H.R. 16785) provided in section 4 (b)(1) that: "Nothing in this Act shall be deemed to repeal or modify any other Federal law prescribing safety or health requirements or the standards, rules or regulations promulgated pursuant to such law".

have permitted or provided for dual and multiple health and safety regulation of the same industry. Abandonment of this approach by both Houses of Congress is a clear manifestation of Congressional intent against the construction of the Act made by the Court below.

Both the House and the Senate added provisions to the bills under consideration excluding from the jurisdiction of the Secretary of Labor those industries subjected to other federal safety and health regulation. While there was a technical difference [33] in the statutory language used by the Senate and that used by the House, careful analysis of House and Senate committee reports on the Act disclosed a common objective [34] of both Houses that the Secretary of Labor

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[33] S. 2193 as reported would have excluded working conditions of employees with respect to *which* other Federal agencies exercise statutory authority; H.R. 16785 as reported would have excluded working conditions of employees with respect to *whom* other Federal agencies exercise statutory authority. The grammatical substitution of "to which" in that final version merely reflects the fact that the Act contains no sanctions for violations of OSHA standards by employees. The only duty of an employee under OSHA is that he "comply with" standards, rules, regulations and orders "which are applicable to his own actions and conduct". 29 U.S.C. § 654(b). In other words, it is "working conditions" rather than "employees" which OSHA regulates; thus, the exclusory provision of 4(b)(1) would be meaningless if "employees" were substituted in lieu of "working conditions".

[34] The opinion below quoted Congressman Perkins' remarks that "[t]here was a major difference in the two bills in the treatment of the proposed effect of other preexisting health and safety statutes"; App. at 6a, n. 8, *citing* 116 Cong. Rec. 42,201 (Dec. 17, 1970) *reproduced in* Staff of Senate Comm. on Labor and Public Welfare, 92nd. Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, 1204 (Comm. Print 1971) [hereinafter cited as Leg. Hist.]. His statement is

should not have jurisdiction where another federal agency had exercised its statutory authority to regulate health and safety.

Greater insight into the Congressional intent behind section 4(b)(1) is gained from the following pertinent comments of Congressman Steiger on the scope of the House-Senate Conference Bill:

> "The coverage of this bill is as broad, generally speaking, as the authority vested in the Federal Government by the commerce clause of the Constitution. The terms of this bill will apply to *all businesses* having an effect on commerce *except* where another Federal agency other than the Department of Labor is exercising statutory authority to prescribe or enforce occupational safety and health standards or regulations."

116 Cong. Rec. 42,206 (daily ed. Dec. 17, 1970) (emphasis added).[35]

In the House debate, the carefully constructed Erlenborn-Daniels colloquy [36] contains repeated refer-

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followed by a recitation of the grammatical change, see n. 33 *supra*, and then a lengthy discussion of the substantive change involved, treatment of the construction industry. Thus, the "major change" was not the grammatical variation explained in n. 33 *supra*, which was not discussed by Congressman Perkins.

[35] Congressman Steiger clarified the foregoing in "The Omnibus Bill: A Bitter Past—A Better Future?" ENVIRONMENTAL CONTROL AND SAFETY MGMT. (June 1971) at p. 11. "The only exception will be those *industries* over which a federal agency other than the Labor Department is exercising statutory authority to prescribe or enforce job safety standards. These include coal mines, metal and nonmetallic mines, railroads and atomic energy" (emphasis added).

[36] 116 Cong. Rec. 38380-38382 (daily ed. Nov. 23, 1970).

ence to an industry exemption.[37] OSHA's co-author, Congressman Steiger pointed out that those instances "where another agency or department has statutory authority . . . *but has taken no action* . . . will be extremely rare." [38] The Daniels-Podell colloquy addressed the exemption as it relates to the mining industry but the language is highly instructive:

> Mr Podell: . . . the U. S. Bureau of Mines of the Department of Interior now has jurisdiction over the health and safety conditions of many mining industries pursuant to the Federal Metallic and Non-metallic Mine Safety Act of 1966. Does Section 22(b) provide for a transfer of this jurisdiction to the Secretary of Labor?
>
> Mr. Daniels of New Jersey: . . . the answer is "No". Section 22(b) would only allow the Secretary of Labor *to assert jurisdiction over health and safety conditions within the mining industries* . . . when the Secretary of Interior has failed to exercise his statutory authority to set health and safety standards or otherwise declines to assert *any* jurisdiction under that Act. In other words, *only* when the Secretary *completely abrogates* his responsibilities . . . would the Secretary of Labor be allowed to invoke section 22(b) and set standards for the mining industries now subject to the Mine Safety Act.[39]

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[37] Mr. Erlenborn: In other words, the mere existence of statutory authority does not *exempt an industry?* It is the *exercise of that authority that does exempt it;* is that correct?

Mr. Daniels of New Jersey: That is correct.

Mr. Erlenborn: . . . if presently existing statutory authority which is not presently being exercised at the time this bill goes into effect but is then subsequently exercised; does that then *at the time it is exercised exempt an industry?*

Mr. Daniels of New Jersey: At the time that that authority is exercised that *industry will be exempt.*

[38] 116 Cong. Rec. 38373 (daily ed. Nov. 23, 1970) (emphasis added).

[39] Leg. Hist. 1037 (emphasis added).

As Congressman Scherle noted, the construction industry is "the only one that is regulated under dual masters".[40]

That the Congress intended a broader section 4(b)(1) exemption than the item by item interpretation of the Court below is reinforced by the reference in section 24(a) (29 U.S.C. § 53(a)) to *"employments excluded by section 4"*. The only exclusion [41] in section 4 (29 U.S.C. § 653) is of "working conditions of employees" governed by section 4(b)(1). If Congress had intended a piecemeal exemption it would have used language similar to that contained in section 4(b)(2) whereby certain preexisting standards "are superceded on the effective date of corresponding standards promulgated under this chapter", 29 U.S.C. § 653(b)(2).

Thus, the "legislative process", the legislative history and statutory language establish that there does not exist the clear indication of congressional intent which would be expected prior to imposition of a drastic change in the preexisting regulatory system. Neverthe-

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[40] Conf. Rep. on S. 2193, Cong. Rec.-House (Dec. 17, 1970), Leg. Hist. 1224.

[41] The court below, in dicta, supported the Secretary's abandoned position that the reference was to "the geographical exemption of section 4(a)", App. at 4a, n. 5, which reads:

> (a) This chapter shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Is., and the Canal Zone. The Secretary of Interior shall, by regulation, provide for judicial enforcement of this chapter by the courts established for areas in which there are no U. S. District Courts having jurisdiction.

29 U.S.C. § 653(a). Your Petitioner can derive no exemption from this language nor could OSHRC which observed that Section 24(a) could only refer to Section 4(b)(1), *Southern Pacific*, App. p. 27a.

less, the ruling below eliminates in the area of occupational safety and health the long existing system of parallel legislation and regulation for the nation's railroads. If the decision is allowed to stand, parallel nonduplicative regulation could not return until FRA has addressed each of the plethora of minutia imposed on general industry.

CONCLUSION

The opinion below should not be allowed to stand because the formula it offers is confusing, unworkable and in contravention of congressional intent. The national importance of jurisdictional demarcation, of giving credence to the intent of Congress, and the pressing need to resolve pending litigation and forestall future litigation mandate a workable and definitive decision on the as yet unresolved issue. We submit therefore that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1977

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

Nos. 74-3981, 75-1613, 74-3984.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *Petitioner*,
v.
W. J. USERY, JR., Secretary of Labor, and Occupational Safety and Health Review Commission, *Respondents*,
and
UNITED TRANSPORTATION UNION AND AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), *Intervenors*.

UNION PACIFIC RAILROAD COMPANY, *Petitioner*,
v.
W. J. USERY, JR., Secretary of Labor, and Occupational Safety and Health Review Commission, *Respondents*,
and
UNITED TRANSPORTATION UNION AND AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), *Intervenors*.

SEABOARD COAST LINE RAILROAD COMPANY, *Petitioner*,
v.
W. J. USERY, JR., Secretary of Labor, and Occupational Safety and Health Review Commission, *Respondents*,
and
UNITED TRANSPORTATION UNION AND AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), *Intervenors*.

Sept. 22, 1976.

Consolidated cases involved the question whether railroads were obliged to comply with safety standards promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act. The Court of Appeals, Gee, Circuit Judge, on petitions for review of orders of the Occupational Safety and Health Review Commission, held that OSHA coverage is displaced by an "exercise" of De-

partment of Transportation authority only for the "working condition" embraced by that exercise.

Petitions denied.

Petitions for Review of Orders of the Occupational Safety & Health Review Commission (Texas and Georgia cases).

Before TUTTLE, GODBOLD and GEE, *Circuit Judges.*

GEE, *Circuit Judge:*

These consolidated cases involve a single question of statutory interpretation: whether the petitioners, at the time the violations involved here occurred, were obliged to comply with safety standards promulgated by the Secretary of Labor (the Secretary) pursuant to the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 *et seq.* (1970). In No. 74-3981, Southern Pacific Transportation Co. petitions for review of an order of the Occupational Safety and Health Review Commission (OSHRC) finding that it committed four nonserious violations of 29 U.S.C. § 654(a)(2) in connection with the June 1972 operation of a diesel service shop in Houston, Texas. In No. 75-1613, transferred to this court by the Eighth Circuit, Union Pacific Railroad Co. petitions for review of a similar order adjudicating three violations of the same statute occurring in September 1972 in Union Pacific's train dispatching center in a yard office in Pocatello, Idaho. In No. 74-3984, Seaboard Coast Line Railroad Co. seeks review of an OSHRC order reversing the decision of its Administrative Law Judge (ALJ) that Seaboard could not be penalized for a nonserious statutory violation allegedly discovered during a March 1973 inspection of Seaboard's rail repair shop in Savannah, Georgia.[1] Because each petition presents for

[1] Alleging that the order remanding the case to the ALJ is not a reviewable order under 29 U.S.C. § 660(a), the Secretary moved to dismiss Seaboard's petition. During the pendency of the petition, the ALJ made a finding that a violation occurred and OSHRC has granted review. Because a finding that we lack appellate jurisdiction would produce the same result—the continuation of OSHRC's review—as our decision on the merits, and because the merits of the petition are already before us in the other two cases, we need not and do not reach the jurisdictional question posed by the Secretary's motion. *See United States* v. *Augenblick*, 393 U.S. 348, 349-52, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); *Slocum* v. *United States*, 515 F.2d 237, 238 n. 2 (5th Cir. 1975); *cf. Norton* v. *Mathews*, — U.S. —, —, 96 S.Ct. 2771, 49 L.Ed.2d — (1976).

review the same and sole legal issue,[2] and expect as specifically noted, we hereafter treat the petitioners as a single entity (the railroads).

These cases turn on the meaning of section 4(b)(1) of OSHA, 29 U.S.C. § 653(b)(1), which provides in Delphic terms:

> Nothing in this chapter [which encompasses the complete text of OSHA] shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies, acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The railroads' position is that this section means that *any* "exercise," be it never so partial, by the Department of Transportation (DOT), acting through the Federal Railroad Administration (FRA), of its statutory authority to regulate railroad safety exempts the railroad industry from OSHA regulations to the full extent of DOT's potential regulatory authority.[3] This position, termed the "indus-

[2] Southern Pacific and Union Pacific conceded that the cited noncompliances existed; Seaboard denied the violation, but this factual issue is not before us now.

[3] The most comprehensive source of the FRA's authority to regulate railroad safety is the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* (1970). Intervenors United Transportation Union and the AFL-CIO argue that this statute does not empower the FRA to regulate the working conditions involved in these cases either because they are not peculiar to rail transportation or because they raise health, as opposed to safety, issues. We intimate no view on the merits of these arguments. We must decide the railroads' claim of an industry-wide exemption regardless of the

try-wide" exemption theory, has been squarely rejected in *Southern Ry.* v. *OSHRC*, No. 75-1055, —— F.2d —— (4th Cir., 1976). Although our analysis follows a slightly different track, we agree with the Fourth Circuit's result and reject the railroads' argument.

The railroads and the Secretary agree that the exemption provided by section 4(b)(1) is not activated by mere existence in the FRA of statutory authority to regulate railroad safety; some "exercise" of that authority is necessary to oust OSHA's pervasive regulatory scheme. Thus, the statute generates an anomalous relationship between the Secretary and agencies such as the FRA, decreeing the existence of overlapping authority to regulate railroad safety, with displacement of OSHA coverage by the FRA dependent on unilateral action by the FRA rather than on either a determination by some neutral agency or on consultation between the Secretary and the FRA. All parties likewise agree that the only exercises of FRA authority before the dates on which the cited violations occurred were promulgation of regulations for specific items of railroad operating equipment and development of an accident-reporting and record-keeping system. Although the issue of statutory interpretation must be addressed in broader terms, the first specific question in these cases is therefore whether these acts are a sufficient "exercise" to activate section 4(b)(1) and thus preempt OSHA coverage of other aspects of railroad employees' safety.[4] We conclude that they are not.

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precise scope of FRA authority. Our conclusion that existing FRA activity does not displace OSHA coverage in these cases makes it unnecessary to consider whether any of that activity is outside the FRA's statutory authority. And it is obviously unnecessary to decide whether the FRA's authority would permit it to regulate these working conditions so as to oust OSHA in the future.

[4] We are not asked to review OSHRC's conclusion that the FRA's recording requirements activate section 4(b)(1) to displace OSHA record-keeping regulations.

The railroads suggest that the phrase "working conditions of employees" in section 4(b)(1) is equivalent to "industries." Building on a comparison between section 4(b)(1) and 29 U.S.C. § 673(a), which exempts "employments excluded by [section 4]" from OSHA's statistical provisions, they argue that "employments" is equivalent to "industries" and that section 4(b)(1) therefore creates an industry-wide exemption. The effect of this argument is first to magnify a minimal ambiguity and then to resolve it by reference to a more ambiguous provision.[5] We think the term "working conditions" plainly refers to something more limited than every aspect of an entire industry. The term has a technical meaning in the language of industrial relations; it encompasses both a worker's "surroundings" and the "hazards" incident to his work. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202, 94 S.Ct. 2223, 41 L.Ed. 2d 1 (1974). And while we must concede that the reference to section 4 in 29 U.S.C. § 673(a) is confusing, we do not agree that this reference gives the phrase "working conditions" a meaning which never appears elsewhere in OSHA—that of "industries." Indeed, other sections of OSHA imply that the term "working conditions" has a narrow scope. *See, e.g.*, 29 U.S.C. § 670(c)(1).

The structure of section 4(b)(1), particularly its cross-reference to 42 U.S.C. § 2021 (1970), reinforces our conclusion that the FRA's pre-1975 regulatory activity did not displace the general OSHA regulatory scheme. Section 2021 deals with state regulation of the atomic energy in-

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[5] Although this case does not require a definitive interpretation of 29 U.S.C. § 673(a), we note that the legislative history offers substantial support for the Secretary's position, rejected by OSHRC, that "employments" refers only to the geographic exemptions of section 4(a), 29 U.S.C. § 653(a). *Compare* S. 2193, 91st Cong., 2d Sess., § 21(b), *reproduced* in Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Health and Safety Act of 1970, 585 (Comm. Print 1971) (hereinafter cited as Leg. Hist.) (final version of Senate bill) *with* Leg. Hist. 1120 & 1135 (final version of House bill—source of 29 U.S.C. § 673(a)).

dustry. It provides a detailed system in which regulation for some purposes is explicitly left to the states, regulation of certain activities is reserved to the Atomic Energy Commission, and regulatory authority over certain materials is entrusted to the federal government subject to federal-state agreements to transfer this authority to a state. Such an arrangement is the antithesis of an industry-wide exemption. We think it most unlikely that section 4(b)(1) was intended to establish industry-wide exemptions for industries otherwise regulated by the federal government when the scope of its exemption for state regulation is so meticulously limited to specific topics.

We also find support for our conclusion in the legislative history of OSHA. The railroads offer a colloquy on the House floor as the definitive legislative history of section 4(b)(1).[6] However, this colloquy dealt with a version of the House bill, a version that differed from the final text of section 4(b)(1) in that it exempted "working conditions of employees with respect to *whom* other Federal agencies . . . exercise statutory authority . . . ." *See, e.g.*, Leg.Hist., *supra* n. 5, at 1135 (emphasis added). The Senate proceedings clearly demonstrate that the Senate language was not intended to create an industry-wide exemption.[7] The conference committee recognized the difference in language

[6] This colloquy, the so-called Erlenborn-Daniels colloquy, is found at 116 Cong. Rec. 38,381-82 (Mar. 23, 1970), *reproduced in* Leg. Hist., *supra* n. 5 at 1018-21.

[7] S. Rep. No. 1282, 91st Cong., 2d Sess. (1970) *reproduced in* Leg. Hist. *supra* n. 5, at 141, states:

> The bill does not authorize the Secretary of Labor to assert authority under this bill over *particular working conditions regarding which* another Federal agency exercises statutory authority to prescribe or enforce standards affecting occupational safety and health. (emphasis added)

Id. at 22, Leg. Hist. at 162; U.S. Code Cong. & Admin. News 1970, p. 5199.

and consciously chose the Senate version.[8] Since the legislative process—the process by which Congress arrived at the statutory language—is often a better guide than the interpretations of individual legislators or committee reports, *see Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974), we attach some weight to the substitution of the Senate version for that passed by the House. And although the Senate's language remains less than pellucid, the conscious and deliberate substitution of that language for the House version tending more clearly toward an industry-wide exemption strongly suggests that the statute as passed contemplates a narrower kind of exemption. *Cf. American Smelting & Refining Co.* v. *OSHRC*, 501 F.2d 504, 508-13 (8th Cir. 1974).[9]

Finally, the purpose of OSHA, announced in particularly expansive terms, is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." 29 U.S.C. § 651(b). If this be the goal, it seems unlikely that Congress would wish the ubiquitous OSHA regulations in question here to be displaced by the FRA's limited operating-equipment and accident-reporting activity. Placed in this context, the railroads' interpretation of section 4(b)(1) as an industry-wide exemption becomes an assertion that a requirement of accident reporting displaces substantive standards designed to prevent accidents —an assertion inconsistent with such an announced statutory purpose.

[8] *See* Leg. Hist., *supra* n. 5, at 1185-86 (Statement of the Managers on the Part of the House). Indeed, the leader of the House representatives on the conference committee remarked in introducing the conference bill to the House that, "[t]here was a major difference in the two bills in the treatment of the proposed effect on other preexisting health and safety statutes." 116 Cong. Rec. 42,201 (Dec. 17, 1970) (remarks of Cong. Perkins), *reproduced in* Leg. Hist., *supra* n. 5, at 1204.

[9] We give regard to the legislative process as a whole rather than merely to the simple grammatical change from "whom" to "which."

Our rejection of the railroads' position does not constitute an acceptance of the theory that every OSHA regulation remains operative until the FRA adopts a regulation of its own on that specific subject. As we have noted, the statutory term "working conditions" embraces both "surroundings," such as the general problem of the use of toxic liquids, and physical "hazards," which can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace). Neither OSHA itself nor the existence of OSHA regulations affects the ability of the primary regulatory agency, here the FRA, to articulate its regulations as it chooses. Much of their displacing effect will turn on that articulation. Section 4(b)(1) means that any FRA exercise directed at a working condition—defined either in terms of a "surrounding" or a "hazard"—displaces OSHA coverage of that working condition. Thus, comprehensive FRA treatment of the general problem of railroad fire protection will displace all OSHA regulations on fire protection, even if the FRA activity does not encompass every detail of the OSHA fire protection standards, but FRA regulation of portable fire extinguishers will not displace OSHA standards on fire alarm signaling systems.[10] Furthermore, as the dominant agency in its limited area, the FRA can displace OSHA regulations by articulating a formal position that a given working condition should go unregulated or that certain regulations—and no others—should apply to a defined subject.

We recognize that a regulatory exercise expressed in terms of a category of equipment or a generalized problem

[10] In *Southern Ry.* v. *OSHRC*, No. 75-1055, — F.2d — (4th Cir., 1976), the court likewise interpreted section 4(b)(1) in a manner which avoided the extreme positions of the Secretary and the railroads. The Fourth Circuit defined "working conditions" as "the environmental area in which an employee customarily goes about his daily tasks." *Id.* at —. Our conclusion that the operative effect of section 4(b)(1) is determined by the manner in which the FRA articulates its exercise of authority seems to us more attuned to the differing possible meanings of the term "working conditions" as it is used elsewhere in the field of industry relations.

may raise questions about whether a given item is covered. Conversely, an exercise expressed in terms of a piece of equipment may create an issue about whether the FRA has regulated the entire category to which that piece belongs. In either situation, the scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulations.

We are sympathetic to the railroads' argument that regulatory duplication is undesirable because it makes it excessively difficult for the employer to know which standards he is required to obey and may create undue expense from successive compliance with different standards. But we think it clear that avoiding duplication was a secondary purpose of the OSHA/FRA scheme. OSHA was drafted in recognition of the possibility, since realized, that the FRA would fail to implement its authority before some OSHA regulations became effective. These unfortunate consequences, inherent in the nature of the beast, may be avoided or greatly minimized by a clear statement, in each instance of displacing regulation, of the FRA's position on these preexisting OSHA regulations which it seeks to oust.

Finally, the railroads contend that the FRA's March 1975 "Advance Notice of Proposed Rule-Making," inviting pre-proposal comment on numerous substantive regulations,[11] combines with preexisting FRA activity to constitute the requisite "exercise" of the FRA's statutory authority. The FRA's 1975 activities are irrelevant to the Union Pacific and Southern Pacific petitions. The violations involved in these two cases, and final administrative decisions on them, occurred before 1975, and the Secretary does not now seek to enforce OSHRC's orders. The March 1975 action may be relevant, however, to Seaboard's petition, and we therefore consider its impact. We agree with the Fourth Circuit's view in *Southern Ry., supra*, that this speculative announcement adds nothing to previous FRA

[11] *See* 40 Fed. Reg. 10,693 (1975). This notice requests comments on enumerated, existing OSHA regulations, including some of those relevant to railroad shops and offices.

activity and is not a sufficiently concrete "exercise" to preempt the otherwise applicable regulations. Section 4(b)(1) requires an actual "exercise" of "authority to prescribe or enforce standards or regulations," and this bare announcement that the FRA is considering promulgation of regulations does not suffice, either alone or in combination with previous activity.[12] The railroads rely on the remarks of the House bill's sponsor that preemption would occur when other agencies were in "the formative stages of regulations or enforcement." 116 Cong.Rec. 38,373 (Nov. 23, 1970) (remarks of Cong. Steiger), *reproduced in* Leg.Hist., *supra* n. 5, at 997. These remarks, whatever they indicate about the intent of the whole Congress, do not convince us that Congress meant for section 4(b)(1) to be activated in the present circumstances by mere announcements of possible regulatory action. Congress obviously wanted railroad health and safety conditions to be regulated forthwith by *some* agency since it took the unusual step of requiring an actual exercise of authority to forestall OSHA coverage. It seems unlikely that this same Congress could have meant for *existing and operative OSHA regulations* to be displaced without more conclusive FRA action than a mere statement of intent to do something in the future. Acceptance of the railroads' theory would produce an especially ludicrous result in the *Seaboard* case; the FRA's still-inoperative proposal to adopt a ventilation regulation would abort OSHRC's effort to induce compliance with an identical OSHA regulation.[13]

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[12] 121 Cong. Rec. 21,261 (daily ed., Dec. 5, 1975) remarks of Sen. Williams, author of the Senate version of OSHA). *Contra, Dunlop* v. *Burlington Northern R. R.*, 395 F. Supp. 203 (D. Mont. 1975). The "Advance Notice" is merely a preliminary to a formal "Notice of Proposed Rulemaking." *Compare* 40 Fed. Reg. 10,693 (1975) *with* 39 Fed. Reg. 25,959 (1974).

[13] *See* 40 Fed. Reg. 10,693, 10,694 (1975). We would confront a different question, one on which the railroads' legislative history might be more persuasive, if the FRA "exercise" were already in a "formative stage" when an OSHA regulation on the same working condition became effective. Thus, our conclusion intimates no view on whether any OSHA regulations newly effective after

We have carefully considered the other maxims of statutory construction and aids to statutory interpretation marshalled by the parties, particularly the interaction between OSHA and the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* (1970), the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.* (1970), the Amtrak Improvement Act, 45 U.S.C. § 502 (Supp. 1973), and the Rail Safety Improvement Act, 45 U.S.C. § 440 (Supp. 1974). We find these additional considerations insufficiently persuasive on either side of the questions before us to require further discussion.

To summarize our view of section 4(b)(1), OSHA coverage is displaced by an "exercise" of DOT authority only for the "working condition" embraced by that exercise. Since DOT has not yet exercised its authority on the working conditions which are the subject of these OSHRC orders, the petitions for review are *DENIED*.

March 1975 on topics covered in the "Advance Notice" apply to the railroad industry. In the same vein, we need not and do not consider the Secretary's position that only actions which create a regulatory "standard" within the meaning of 29 U.S.C. § 652(8) is an "exercise" triggering section 4(b)(1).

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-3984

Your No. OSHRC 2862

SEABOARD COAST LINE RAILROAD COMPANY,
Petitioner,

VERSUS

PETER J. BRENNAN, Secretary of Labor, and
OCCUPATIONAL SAFETY and HEALTH
REVIEW COMMISSION,
Respondents.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (Georgia Case)

Before TUTTLE, GODBOLD and GEE, *Circuit Judges.*

Judgment

This cause came on to be heard on the petition of Seaboard Coast Line Railroad Company for review of an order of the Occupational Safety and Health Review Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Occupational Safety and Health Review Commission in this cause be and the same is hereby denied;

It is further ordered that petitioner pay to respondents the costs of appeal to be taxed by the Clerk of this Court.

September 22, 1976

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74-3984

(Caption Omitted in Printing)

On Petitions for Review of Orders of the Occupational Safety & Health Review Commission (Texas and Georgia cases)

On Petition for Rehearing

Before TUTTLE, GODBOLD and GEE, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 2802

Peter J. Brennan, Secretary of Labor,
Department of Labor,
Complainant,

v.

Seaboard Coast Line Railroad Company,
Respondent.

Order Granting Respondent's Motion To Dismiss Complaint

By an amended citation originally issued April 2, 1973, the Respondent was charged with violating a safety standard [29 CFR 1910.94 (b)(2)(i)] promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, hereinafter referred to as the Job Safety Act. The Secretary proposed no monetary penalty for the violation so cited.

The citation which resulted from an Occupational Safety and Health Administration (OSHA) inspection on March 28, 1973 described the alleged violation in the following terms:

> "Failure to provide exhaust ventilation to two Nordberg rail frog grinders in use inside the Maintenance Shop. (3-28-73, 11 am.)"

The citation specified the address of the Respondent's workplace where the cited violation was noted and described the nature of the workplace as, "Railroad Transportation". In the complaint the workplace was characterized as a place of business devoted to "the maintenance and repair of railroad equipment used in connection with the operation of a railroad transporting goods in commerce."

In the Notice of Contest to the Citation, the Answer and his Motion to Dismiss, the Respondent, [supporting his position with points and authorities], avers that the Occupational Safety and Health Review Commission (the Commission)has no jurisdiction over the subject matter of this case because Congress has vested the authority to prescribe and enforce occupational safety and health standards relating to the railroad industry, (of which Respondent is admittedly a part) in the Department of Transportation, pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. Section 421 *et seq.*, hereinafter referred to as the Railroad Safety Act. The Respondent further submits that the Commission has no jurisdiction over the subject matter of this case because the Department of Transportation possesses, and has exercised, authority vested in it by Congress under the Railroad Safety Act to prescribe and enforce safety and health standards for the railroad industry, and in Section 4(b)(1) of the Job Safety Act, Congress excluded or exempted the railroad industry from the coverage of the Act, as it did in respect to other industries, including aviation and coal mining, in the Aviation Act of 1958 (45 U.S.C. 1301 *et seq.*), and the Federal Coal Mine Health and Safety Act of 1965, (30 U.S.C. 801 *et seq.*)

I note at this point that this jurisdictional issue, as it relates to the question of whether the coverage of the Job Safety Act extends to the railroad industry, is presently under Commission review in two cases styled, *Secretary of Labor* v. *Southern Pacific Transportation Company,* [OSHRC Docket No. 1348, January 8, 1973), *Secretary of Labor* v. *Penn Central Transportation Company,* [OSHRC Docket No. 738, January 26, 1973), and it would seem that resolution of the issue herein involved [which I will discuss only briefly here, because of its lengthy treatment in the above cited cases] will be determined and resolved by the Commission in those cases.

After a careful examination of the briefs submitted in this case, the relevant legislative history involved in the Job Safety and the Railroad Safety Act, the regulations promulgated under the latter Act (including those specified in Appendix A, Respondent's Second Brief in Support of its Motion to Dismiss) I am constrained to agree with the Respondent's overall position expressed in its brief that "with the adoption of some regulations and developmental stages of other regulations under the plenary authority of the Federal Railroad Safety Act of 1970 the exercise of regulatory jurisdiction is over all significant areas of railroad safety and that in these circumstances Congress intended an industry exemption" [See p. 6 *et seq.* of Respondent's second brief].

While this "exercise" of statutory authority represented by prescribing or enforcing standards or regulations affecting the occupational safety or health of the Respondent's employees, [as reflected by the listing of railroad safety rules, regulations and standards contained in "Appendix A", Respondent's second brief] may not extend to every railroad employee at this point in time, the record clearly reflects that the Department of Transportation, as the agency enjoying primary jurisdiction, has in fact "taken steps to exercise its authority, even though the action might be at the formative stage of regulation or enforcement".*

In fact, a reading of the regulations listed in "Appendix A" (above) would seem to make it clear, that the Department of Transportation's actual exercise of its statutory authority to enact railroad safety regulations even at this juncture, is far beyond the "formative" stage, referred to by Congressman Steiger, and that such exercise as has been effected by the Department of Transportation up until this time clearly meets the level which Congress

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* Congressman Stiger, Page 997, *Legislative History of the Occupational Safety and Health Act of 1970, (S. 2193, P. L. 91-596), June, 1971.*

contemplated as sufficient to invoke or trigger the exemption or exclusionary language of Section 4(b)(1) of the Job Safety Act.

I might further note that my interpretation of the legislative history of the Job Safety Act coincides fully with that of the Respondent, as outlined in pages 19-22 of his first brief, to the effect that Congress in its debates on what was to become the final bill intended to exclude industries rather than parts of industries (with the concomitant administrative and judicial mischief and duplication such a partial exclusion would entail).

As the Respondent notes on pages 19 and 20 of his first brief supporting his Motion to Dismiss, in both the House and the Senate, provisions were added to the bills under consideration excluding from the jurisdiction of the Secretary of Labor industries already regulated by other Federal Agencies, and analysis of the respective committee reports leads to the Conclusion that the common objective of both houses of Congress was that the Secretary of Labor shall not regulate an industry which is already being regulated by another Federal agency in the safety area.

Any existing doubts as to Congress' intent in the above regard, would seem to be clearly dispelled by the clarifying remark of Chairman Perkins to Congressman Erlenbonn, during the debate on H. R. 16785, when Congressman Erlenbonn raised the question of possible dual applicability of the bill under consideration of the mining industry, an area already covered by remedial safety legislation, as the railroad industry was. Chairman Perkins in response assured Erlenbonn that the Job Safety Act would not extend to the railroad or mining industries when he replied,

> "Mr. Perkins: I would say to my distinguished colleague that he is incorrect in that statement because all of these various legislative Acts as *railway safety*

and mine safety are specifically exempted under Section 22(b). (emphasis supplied)

Mr. Erlenbonn: I stand corrected." *

To deny the motion under consideration here, would be to fly in the face of the clearly expressed intent of the framers of the Job Safety Act that the coverage of that Act was not to embrace certain industries such as railroad or mining, whose employees were already covered by safety regulations.

I find further support in my above expressed conclusion that Congress intended industries to be excluded, in the second sentence of Section 24(a) of the Job Safety Act itself, that it is "employments" which are excluded by Section 4 of that Act, this word is susceptible of relating *only* to Section 4(b) of the Act, and can therefor only be interpreted as confirming Congress' intent to exclude from the coverage of the Act, employments in certain industries.

In compliance with Congressional command therefore, as expressed in Section 4(b)(1) of the Job Safety Act to the effect that "*nothing*" in that Act shall apply "to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authenity to prescribe or enforce standards or regulations affecting occupational safety or health," I am constrained to grant the Respondent's Motion to Dismiss the Complaint in the captioned cause.

The said motion is accordingly granted, and it is ORDERED that the Complaint herein be dismissed and the Citation issued on April 2, 1973 and its accompanying Notification of Proposed Penalty be and are hereby vacated.

/s/ HERBERT E. BATES
Herbert E. Bates
Judge, OSHRC

Dated: Illegible

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* P. 1019, *Legislative History of the Occupational Safety and Health Act of 1970*, 92nd Congress, 1st Session, June, 1971.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

(Caption Omitted in Printing)

Decision

BEFORE: MORAN, *Chairman*; VAN NAMEE and CLEARY, *Commissioners*.

VAN NAMEE, *Commissioner*:

This matter presents precisely the same question of law we resolved by our decision in *Southern Pacific Transportation Co.*, OSHRC Docket No. 1348 (November 15, 1974).[1] The question was presented by a pre-hearing motion filed with Judge Herbert E. Bates. He determined that Respondent herein (Seaboard) was exempted from the provisions of the Occupational Safety and Health Act of 1970[2] because in his view section 4(b)(1) thereof creates an industry wide exemption. Accordingly, he vacated the Secretary's citation and proposed penalty because the Department of Transportation (DOT) has promulgated some safety regulations. For the reasons given in *Southern Pacific* we reverse; a copy of that decision is attached.

Respondent has not conceded the existence of a violation on the facts, and the Judge's disposition was made without a hearing on the merits. Accordingly, this matter must be remanded.

Therefore, the Judge's decision is reversed and the matter is remanded for further proceedings consistent with this decision.

FOR THE COMMISSION:

/s/ WILLIAM S. MCLAUGHLIN
William S. McLaughlin
Executive Secretary

Date: Nov. 18 1974

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[1] This case was consolidated with *Southern Pacific* for oral argument. The order of consolidation was dissolved in *Southern Pacific*, slip opinion at n. 1, so that separate opinions could issue.

[2] 29 U.S.C. 651 *et seq.*

MORAN, *Chairman*, Dissenting:

Judge Bates correctly disposed of this case and his decision should be affirmed. The action which Congress took in 29 C.F.R. § 653(b)(1) was not, in the traditional sense, an exclusion of railroads from coverage of the Occupational Safety and Health Act of 1970, *supra*. It was a subordination of that Act to the already existing laws that Congress had enacted for railroad safety. The wording of that section expressly provides that "*nothing* in this Act shall apply to working conditions of employees with respect to which other Federal Agencies . . . exercise statutory authority to prescribe or enforce standards or regulations *affecting* occupational safety or health" [emphasis supplied].

The nook-and-cranny rule[3] which the Commission is hereby promulgating would, as Judge Bates points out, bring "concomitant administrative and judicial mischief and duplication."

An example of this is the law and regulations, which have existed for more than half a century, limiting railroad employees' working hours. 45 U.S.C. § 62. 49 C.F.R. Part 228. This clearly is an exercise of job safety authority by the Department of Transportation which affects railroad employees and is an example of the kind of thing Congress did not want to repeal.

The Commission, by giving the Secretary of Labor the power to regulate what the railroads must do—and how

[3] This rule provides that if the Secretary of Transportation has not issued a regulation which may serve as the legal basis for eliminating a particular working condition which the *Secretary of Labor* has deemed to be hazardous by virtue of *his* act in issuing an occupational safety and health standard, then the provisions of the Occupational Safety and Health Act of 1970 will apply as to that particular working condition. This novel approach gives the Secretary of Labor the authority to extend job safety coverage over all workers by merely issuing regulations in areas other Federal officials have, in *their* judgment, deemed to be not hazardous—or not in need of the type of control which a Federal regulation provides.

they must operate—in order to protect their employees, has overturned a basic regulatory scheme which Congress adopted long ago and has never shown an intent to change.[4]

Certainly if Congress intended the radical change which this decision brings about, some mention thereof would have been contained in the debates of the Occupational Safety and Health Act of 1970. Not a word in support of the Commission's nook-and-cranny theory was spoken by any Member of Congress during those debates, however.

In fact, just the opposite occurs. Senator Williams of New Jersey, Chairman of the Senate Committee which proposed this legislation stated during the floor debates:

> ". . . . There has been no description here that I have heard of the failure of any of these programs, whether it is construction safety, railway safety, or coal mine safety."[5]

He also commented that ". . . the most effective regulation is based upon experience that comes from enforcement."[6] This decision is in direct contravention of that principle.

One cannot read the provisions of the Occupational Safety and Health Act of 1970 and its legislative history without concluding that Congress intended to create a workable system to improve occupational safety and health and that they were wise enough to leave all aspects of safety in the railroad industry in the hands of the railroad experts in the Department of Transportation.

[4] The Act grants the Secretary of Labor very broad authority to determine what is hazardous and to promulgate safety standards to insulate employees from the same. 29 U.S.C. §§ 655, 651. Based upon the rule of this decision he could legally overrule the Secretary of Transportation and change all railroad rules by promulgating standards regulating the hours of work of all employees or the width of the track on which railroad trains run. Both regulations could be justified as necessary for employee safety.

[5] See *Legislative History of the Occupational Safety and Health Act of 1970*, Subcommittee on Labor, Committee on Labor & Public Welfare, United States Senate, 92d Congress, 1st Session at 429.

[6] *Id.* at 427.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 1348

SECRETARY OF LABOR, *Complainant*

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *Respondent*
RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO, *Authorized Employee Representative*

Decision

Before MORAN, *Chairman;* VAN NAMEE and CLEARY, *Commissioners.*

VAN NAMEE, *Commissioner:*

This matter [1] presents an important question of statutory interpretation involving section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*, hereinafter "OSHA"). It arose out of an inspection conducted by the Department of Labor (Labor) of Respondent's (Southern Pacific) shop facility located in Houston, Texas. As a result of the inspection Labor cited Southern Pacific for failure to comply with certain crane safety standards,[2] for failure to post an informational poster,[3] and for failure to maintain a log of injuries and illnesses [4] contrary to sec-

[1] This case was consolidated with the case of *Penn Central Transp., Co.*, OSHRC Docket No. 738, for purposes of review. Subsequently both cases were consolidated with *Union Pacific R.R.*, OSHRC Docket No. 1697 and *Seaboard Coastline R.R.*, OSHRC Docket No. 2802 for purposes of oral argument. Pursuant to Commission Rule 10, we hereby sever the aforementioned cases so that separately written determinations may be made in each.

[2] 29 C.F.R. 1910.179(b)(5) and 179(j)(2).

[3] 29 C.F.R. 1903.2(a).

[4] 29 C.F.R. 1904.2(a).

tions 5(a)(2) and 8(c) of OSHA. Southern Pacific duly contested and the matter came on for hearing before Judge John C. Castelli. At the hearing, Southern Pacific conceded that it had not complied with the standards and regulations alleged to have been violated. Rather, it argued that in view of the terms of section 4(b)(1) of OSHA it is excepted or exempted [5] from compliance because the Secretary of the Department of Transportation (DOT) has exercised his authority pursuant to the Federal Railway Safety Act of 1970, 45 U.S.C. 421 *et seq.* (FRSA) and other earlier railway safety acts to promulgate and enforce safety regulations affecting the working conditions of railway employees. Labor concedes that DOT has authority to regulate all areas of employee safety for the railway industry. It argues that Southern Pacific is not excepted or exempted from OSHA and the standards and regulations cited in this case because DOT has not exercised its authority in the areas covered by the said standards and regulations.

The adverse positions may be summarized as follows: Southern Pacific contends that section 4(b)(1) exempts all working conditions in the railway industry because DOT has exercised some of its authority; and Labor contends

[5] Despite some confusion as to the appropriate designation for section 4(b)(1), the parties generally agree that it operates to exclude something (whether particular industries or, as shown *infra*, particular working conditions) from the general applicability of the Act. Thus, the provisions of section 4(b)(1) are in the nature of an "exception", the function of which is to exempt (or exclude) some portion from the operative effect of the Act. See *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876 (6th Cir. 1944); *United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *Electric Ry. Employees Local 1210* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3rd Cir. 1951). Accordingly, the party who claims the benefit of an exception has the burden of proving its entitlement thereto. *United States* v. *First City National Bank of Houston*, 386 U.S. 361 (1967); *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

that section 4(b)(1) exempts only those areas of employee safety in which DOT has exercised its authority. Judge Castelli, in essence, adopted Labor's view. He concluded that DOT had not exercised its authority to regulate railway employee safety in shop and repair facilities, and he affirmed the alleged violations of the OSHA crane standards and the alleged informational poster violation. He vacated the recordkeeping violation for the reason that DOT has promulgated accident reporting requirements.

On review of his decision Southern Pacific asks for reversal for the reasons given by it below; Labor asks for affirmance where violations were found below and for reversal of the Judge's disposition of the recordkeeping allegation; and DOT, appearing as an *amicus curiae* at our invitation, seeks affirmance of Judge Castelli's disposition. We have reviewed the record and have considered the arguments of all participants in this matter. For the reasons given hereinafter we affirm.

Section 4(b)(1) provides in pertinent part as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 U.S.C. 653(b)(1).

Obviously, the section is not self-defining for its terms can be construed to create the broad exemption Southern Pacific seeks or the narrow exemption for which Labor and DOT argue. Moreover, all parties point to the legislative history of the section as providing support for their respective views. And, indeed, the legislative history is as persuasive for one side as it is for the other.[6] Accordingly, it cannot be said to be dispositive of the issue.

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[6] *See, e.g., Legislative History of the Occupational Safety and Health Act of 1970*, Committee Print, pgs. 162, 997, 1019, 1020, 1037, 1223 (1971).

Therefore we turn to the congressional findings and statements of purpose and policy for guidance. OSHA came about because workplace injuries and illnesses impose "a substantial burden upon, and are a hinderance to, interstate commerce," 29 U.S.C. 651. In order to alleviate this burden, Congress determined its purpose and policy was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). This policy can only be effectuated by interpreting OSHA to include rather than exclude working conditions of employees. Otherwise it cannot be said that the Nation's human resources were preserved "so far as possible."

But the interpretation sought by Southern Pacific would operate to exclude any coverage of working conditions in railway offices, shops, and repair facilities because DOT says it does not now regulate safety and health in such areas and it does not contemplate regulating these areas in the future. In this regard, we deem it highly significant that DOT joins with Labor in requesting a narrow interpretation of section 4(b)(1) for as DOT says "[t]o interpret the exemption as an 'industry' exemption would leave wide gaps in coverage."[7] We too cannot believe Congress intended such gaps in coverage.

Moreover, the interpretation sought by Labor and DOT accords with the rule that exemptions from humanitarian and remedial legislation are to be narrowly construed. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490 (1945); *Spokane & I. E. R. Co.* v. *United States*, 241 U.S. 344 (1916); *Sterns* v. *Hertz Corp.*, 326 F.2d 405 (8th Cir., 1964); *Herren* v. *United States*, 317 F. Supp. 1198 (D.C. Texas; 1970), *aff'd* 443 F.2d 1363 (5th Cir., 1971).

Finally, we are not persuaded to a different result by the fact that the 91st Congress enacted the FRSA and the Rail

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[7] Brief of the DOT at pg. 8.

Passenger Service Act of 1970 (P.L. 91-518) during the same session as and prior to the enactment of OSHA. As to the FRSA the question is not whether DOT has authority but rather whether that authority has been exercised. We have already addressed this argument. As to the Rail Passenger Service Act the argument is that since section 405(d) thereof precludes application of safety standards promulgated pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) to railroad employees OSHA standards could not have been intended to apply to such employees. The short answer is that we are dealing with OSHA and not with the Contract Work Hours and Safety Standards Act. In any event construction safety standards are not involved in this case.

Accordingly, we conclude that section 4(b)(1) of OSHA does not provide an industry exemption. Rather, it provides an exemption for specific working conditions. Thus, as in this case, when a Federal agency or department has authority to regulate safety and health working conditions in, e.g., railroad shops, and does not exercise that authority, the said working conditions are subject to OSHA regulations.

We turn now to the matter of recordkeeping for a different situation pertains. DOT has exercised its statutory authority in this area; it requires accident reporting by railroad employers.[8] Labor seeks reversal of Judge Castelli's decision to vacate on the basis that recordkeeping requirements are not "working conditions" within the meaning of the exemption. We cannot agree.

A requirement to compile and maintain accident records is not unlike a requirement to collect, compile, and maintain statistical data relating to occupational safety and health. However, according to section 24(a) of OSHA

[8] *See* 49 C.F.R. 225.

(29 U.S.C. 673(a))[9] Labor cannot impose a statistical program upon "employments excluded by section 4" of OSHA. In our view, section 4(b)(1) constitutes the only exclusionary provisions to be found in section 4.[10] Since both "working conditions" and statistical programs as to "employments" are excludable by operation of section 4(b)(1) we think it would make for an inharmonious construction of OSHA to require recordkeeping as to excepted or exempted working conditions or employments. Moreover, by its own terms, section 4(b)(1) applies to the entire OSHA and thus necessarily provides for an exemption from the recordkeeping requirements of section 8 (29 U.S.C. 657). Finally, the terms of section 8(d) (29 U.S.C. 657(d)) require the avoidance of imposing unnecessary duplication of recordkeeping requirements on employers. DOT requires recordkeeping, and, as we see it, Labor's argument, if upheld herein, would result in unnecessary duplication.[11]

Labor also argues for affirmance of its citation because its regulation involved herein (29 C.F.R. 1904.2(a)) goes

[9] Section 24(a) provides, in pertinent part:

> "In order to further the purposes of this Act, the Secretary . . . shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act, but shall not cover employments excluded by section 4 of the Act." 29 U.S.C.

[10] Labor would have us adopt a conclusion that the exclusionary provision of section 24(a) refers to section 4(a) rather than 4(b)(1). The argument is misplaced. By its plain terms section 4(a) refers to where OSHA shall apply; 4(b) states where it shall not apply.

[11] Through its brief filed herein DOT has offered to make its accident records available to Labor. We see no reason why the offer should not be accepted as a practical solution to the problem. Moreover, we believe the two departments are fully capable of resolving any differences they might have as to the kind of records that are required.

further or requires more than DOT's regulation. But as Commissioner Cleary said in speaking for the majority in *Mushroom Transportation Company, Inc.*, OSHRC Docket No. 1588, BNA 1 O.S.H.C. 1390, 1392, CCH Employ, S. & H. Guide, para. 16,881 at 21,591 (1973), "Section 4(b)(1) does not require that another agency exercise its authority in the same manner or *in an equally stringent manner.*" (emphasis added). We view Labor's argument herein to be directed to the sufficiency or adequacy of the DOT regulation. Accordingly, our decision in *Mushroom Transportation* is controlling and the citation must be vacated as to the recordkeeping allegation.

Therefore, the Judge's decision is affirmed, and it is so ORDERED.

FOR THE COMMISSION:

/s/ WILLIAM S. MCLAUGHLIN
William S. McLaughlin
Executive Secretary

Date: Nov. 15, 1974

CLEARY, *Commissioner*, CONCURRING IN PART AND DISSENTING IN PART:

I concur with the holding of the lead opinion that section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), does not provide an industry exemption for the railroad industry. I dissent, however, from the holding that the recordkeeping requirements under the Act are inapplicable to respondent because it is already covered by the accident reporting provisions of the Federal Railway Safety Act of 1970, 45 U.S.C. § 421 *et seq.*

I.

On several other occasions the Commission has been called on to determine whether the language of section 4(b)(1) of the Act exempts various working conditions from the Act's coverage. In the Commission's first major

decision on this point, *Mushroom Transport. Co., Inc.*, No. 1588 (November 7, 1973), *petition for review dismissed*, No. 74-1034 (3d Cir. 1974), the Commission held that a common carrier who was regulated by the Motor Carrier Safety Regulations of the Department of Transportation was exempted from compliance with specific OSHA standards related to wheel chocks.[12] The Commission's decision emphasized three considerations: Section 4(b)(1) is intended to avoid duplication in the enforcement of occupational safety and health regulations; once another federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions; and section 4(b)(1) does not require that the other agency's regulations be similar or even equally stringent.

In *Fineberg Packing Co.*, No. 61 (February 22, 1974), the Commission held that a meat processor who was subject to the provisions of the Federal Meat Inspection Act as amended by the Wholesome Meat Act of 1967, 21 U.S.C. § 601 *et seq.*, was not exempted from coverage under the Occupational Safety and Health Act. The Commission noted that the purpose of the Wholesome Meat Act is primarily to protect consumers, even though employees may receive incidental protection.[13]

> To be cognizable under section 4(b)(1), we conclude that a different statutory scheme and rules thereunder must have a policy or purpose that is consonant with that of the Occupational Safety and Health Act. That is, there must be a policy or purpose to include employees in the class of persons to be protected thereunder.

Fineberg, supra (slip op. at 4).

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[12] The Commission held that the OSHA standard at 29 CFR § 1910.178(k)(1) was pre-empted by the Motor Carrier Safety Regulations at 49 CFR § 392.20.

[13] This case involved alleged unsanitary conditions in change rooms, toilets, and waste room facilities in contravention of the OSHA standard at 29 CFR § 1910.141(a).

The "policy or purpose" test expressed in *Fineberg* was again followed in *Sigman Meat Co., Inc.*, No. 251 (May 6, 1974), another food processing case.

Finally, in *Bettendorf Terminal Co.*, No. 837 (May 10, 1974), the Commission held that an employer located 10 miles from a quarry that only unloaded, dried, stored, and delivered sand was not engaged in "milling operations" and not exempted from coverage because of the Metal and Non-Metallic Mine Safety Act, 30 U.S.C. § 721 *et seq.* Thus, the Commission declined to extend an exemption under section 4(b)(1) to an employer who was only tangentially related to a business regulated by another safety act and who was never inspected by the Secretary of the Interior under the Mine Safety Act.

Three essential elements necessary for an exemption under section 4(b)(1) emerge from these cases. First, the policy or purpose of the other Act by virtue of which an exemption is claimed must be to assure safe and healthful working conditions for the benefit of employees. *See Fineberg, supra.* Such a finding is compelled by a reasonable reading of section 4(b)(1), the Commission's own precedent, and the legislative history of the Act.[14]

The second requirement for an exemption under section 4(b)(1) is that the other federal agency actually exercises its authority to prescribe and enforce occupational safety and health standards. "[I]f an agency fails to promulgate or enforce regulations covering specific working conditions, the Act will apply to these conditions."[15] With respect to

[14] In debate over the scope of exemption under section 4(b)(1) of the Act, Congress only referred to acts whose purpose was to assure safe and healthful working conditions for the benefit of employees. *See* Staff of Subcommittee on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 1018-20, 1037 (Comm. Print 1971) (hereinafter cited as "*Legislative History*").

[15] *Bettendorf Terminal Co.*, No. 837 (May 10, 1974) (Cleary, Commissioner, Concurring) (slip op. at 8-9).

this possibility, Congressman Steiger, co-sponsor of the Act, remarked:

> While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health, but has taken no action, it is anticipated that these instances will be extremely rare. It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcement.[16]

The final requirement for an exemption under section 4(b)(1) is that the conditions covered by the OSHA standard are also covered by the regulations of the other agency. Although we held in *Mushroom* that the other agency's regulations need not be similar or even equally stringent, the specific conditions regulated by OSHA must be included in the other regulations, or if there is a limited exclusion, the exclusion must be express and intentional.[17]

II.

In analyzing the present case in light of the announced test, our starting point is a determination of the policy

[16] *Legislative History* at 997. *See also* the comments of Congressman Daniels, *Legislative History* at 1019-20.

[17] The purpose of this requirement is so that the mere coverage by another agency's regulation of one item in an OSHA standard will not serve to exempt the other items covered only by OSHA.

> Clearly, section 4(b)(1) is intended to avoid a duplication in the enforcement efforts of Federal agencies, the action of which provides job safety and health protection to employees. By the same token, there is perforce an intent to have no hiatus in the protection of employees.

Mushroom Transport. Co., supra at 2.

and purpose of the Federal Railway Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* Section 421 of FRSA contains the Congressional declaration of purpose.

> The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

45 U.S.C. § 421.

The fact that the FRSA has a broad purpose and is not limited to providing solely for the occupational safety and health of employees is not fatal. There is nothing in the FRSA or its legislative history that suggests that reducing employee injuries is only an incidental aim of the legislation.[18]

The next factor to consider is whether the Department of Transportation (DOT) exercised its authority to prescribe and enforce job safety regulations under the FRSA. With respect to the crane safety standards, conceded by respondent to be contravened in its shop facility, the evidence is uncontroverted that DOT has neither exercised its grant of authority in this area nor is in the process of implementing such regulations. As DOT itself points out in its amicus curiae brief:

> Even though DOT has broad authority to regulate railroad safety, it does not regulate all aspects of railroad safety. In general, DOT has not regulated offices and shop and repair facilities. . . .

Brief for DOT as Amicus Curiae at 6.

Inasmuch as no regulations have been promulgated by DOT, and none are in the formative stage, that would pro-

[18] *See 1970 U.S. Code Cong. & Adm. News* 4104-32.

vide coverage for the working conditions in the shop facility of respondent, it must be concluded that respondent is not exempt from coverage under the Occupational Safety and Health Act. To adopt respondent's suggestion and hold that the enactment of the FRSA constitutes an industry-wide exemption would result in "wide gaps in coverage."[19] Such a consequence would be antithetical to the Act's express purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditons." Section 2(b) of the Act, 29 U.S.C. § 651(b). As the Fourth Circuit stated in reference to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*: "Remedial social legislation of this nature is to be construed liberally in favor of the workers whom it was designed to protect, and any exemption from its terms must be narrowly construed." *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967), *cert. denied*, 389 U.S. 834 (1967).

I therefore concur with the lead opinion's finding of a violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(2), as to the specific standards in respondent's shops.

III.

In turning to the recordkeeping issue, it is apparent that DOT has exercised its Congressional grant of authority in this area to require the filing of various accident reports.[20] Thus, the only other element to consider in exempting respondent from compliance with the recordkeeping requirements of OSHA is whether the conditions covered by OSHA regulations are covered by the FRSA regulations.

Part 225 of Title 49 of the Code of Federal Regulations contains all of the accident reporting provisions promul-

[19] This view is shared by DOT. *See* Brief for DOT as Amicus Curiae at 8.

[20] *See* 49 CFR § 225, discussed in detail *infra*.

gated by the Federal Railroad Administration (FRA) under the Accident Reports Act, 45 U.S.C. § 40 and other statutes. The purpose of these accident reporting provisions is the disclosure of hazards in railroad transportation.[21]

Although at first glance these reporting provisions seem to duplicate the recordkeeping requirements of section 8(c)(1), 29 U.S.C. § 657(c)(1), and the regulations promulgated by the Secretary of Labor pursuant to that section of the Act, a closer look at the railroad reporting provisions indicates that vast numbers of accidents are excluded.[22]

Subpart (b) of 49 CFR § 225.14 excludes from the reporting provisions any injury to an employee that does not incapacitate the employee for more than 24 hours in a 10-day period. Under OSHA, however, injuries without lost workdays, must be reported if a job transfer or termination results, if medical treatment other than first aid is required, or if there is a loss of consciousness, restriction of work or motion, or the diagnosis of occupational illness.[23]

Subpart (e) of 49 CFR § 225.15 also excludes from the reporting provisions any accident that results from "horseplay." These types of injuries are includable under OSHA.

Finally, and most importantly, 49 CFR § 225.15(e) excludes from reporting any disability resulting from illness.

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[21] 49 CFR § 225.10. The accident reporting provisions cover injuries to employees, passengers, third parties, and damage to equipment.

[22] It may also be concluded that because recordkeeping requirements of OSHA are not substantive rules prescribing courses of conduct related to occupational safety and health, that these provisions are not subject to an exemption under section 4(b)(1). *See Bettendorf Terminal Co.*, No. 837 (May 10, 1974) (Cleary, Commissioner, Concurring) (slip op. at 9).

[23] *See* 29 CFR § 1904.12(e). With respect to occupational illness, *see infra*.

The reporting of occupational illnesses was specifically intended by Congress to be an important part of the recordkeeping requirements of the Act.[24] Congress was well-aware of and much-concerned about the 390,000 new occurrences of occupational disease each year.[25]

Despite the much-quoted language in *Mushroom* that the other agency's regulations need not be similar or even equally stringent, nothing that we stated in that decision should be construed as favoring exemptions under section 4(b)(1) of an entire field of occupational safety and health regulations when another agency's regulations only offer limited coverage. Such a construction clearly frustrates Congressional objectives and must be rejected.[26]

A close reading of the Act itself indicates that exact recordkeeping of occupational injuries and illnesses was one of the major aims of the Act. Recordkeeping procedures are specifically mentioned in sections 2(b)(12);[27] 8(c)(1), (2), and (3);[28] 19(a)(3), (4), and (5);[29] and 24(a) and (b)(1) and (2).[30]

Although requiring the railroads to maintain OSHA records in addition to FRSA records would involve some duplication, this is a small price to pay for assuring that accurate records of all workplace injuries and illnesses are maintained. The record-keeping requirements under the

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[24] *See S. Rep.* No. 91-1282, 91st Cong., 2d Sess., (October 6, 1970) at 16.

[25] *Id.* at 3.

[26] *Cf. Brennan* v. *O.S.H.R.C. & Gerosa, Inc.*, 491 F.2d 1340, 1343 (2d Cir. 1974); *Brennan* v. *O.S.H.R.C. & Santa Fe Trail Transport Co.*, No. 74-1049 (10th Cir., October 23, 1974).

[27] 29 U.S.C. § 651(b)(12).

[28] 29 U.S.C. § 657(c)(1), (2), and (3).

[29] 29 U.S.C. § 668(a)(3), (4), and (5).

[30] 29 U.S.C. § 673(a), (b)(1) and (2).

Act present neither an excessive burden nor a conflict with any FRSA procedures. Furthermore, Congress recognized that some duplication in compiling these records is inevitable.

Section 8(d) of the Act, 29 U.S.C. § 657(d) specifically states: "Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." Similarly, section 4(b)(3), 29 U.S.C. § 653(b)(3) reads: "The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal Laws." With respect to this problem, the Senate Committee on Labor and Public Welfare stated the following:

> The committee recognizes the need to assure employers that they will not be subject to unnecessary or duplicative record-keeping requests and has specifically stated this intent in section 8(d). To that end the committee intends that, wherever possible, reporting requirements should be satisfied by having an employer report relevant data only to one Governmental agency and that other Governmental agencies, if any, should then acquire their information from the original agency.[31]

It should be apparent that the long-range answer to the problem of duplication lies in inter-agency cooperation. Indeed, this was suggested by DOT in its brief.[32] In the meantime, however, the health and safety of all workers and the express purposes of the Act dictate that the railroad industry must comply with the recordkeeping requirements of the Occupational Safety and Health Act.

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[31] *S. Rep.* No. 91-1282, 91st Cong., 2d Sess., (October 6, 1974) at 17.

[32] *See* Brief for DOT as Amicus Curiae at 12.

For these reasons I dissent from that portion of the lead opinion that would exclude respondent from its record-keeping responsibilities under the Act.

MORAN, Chairman, Concurring in Part, Dissenting in Part:

The problem presented in this case would be nonexistent if Congress had not enacted more than one statute which regulated working conditions of employees. Nor would it have been present if Congress had provided in the Occupational Safety and Health Act of 1970 that this Act would regulate job safety and health conditions of all employees.

We are confronted with a jurisdictional question simply because Congress, over the span of many years, enacted a number of statutes which included provision for regulatory authority in order to improve safety conditions. Then, with full knowledge that it had done so, and having no intention to repeal or modify any of them, the Congress enacted the 1970 Job Safety Law and made it clear therein that its provisions would *not* apply

> ". . . To WORKING CONDITIONS OF EMPLOYEES WITH RESPECT TO WHICH OTHER FEDERAL AGENCIES . . . EXERCISE STATUTORY AUTHORITY TO PRESCRIBE OR ENFORCE STANDARDS OR REGULATIONS AFFECTING OCCUPATIONAL SAFETY OR HEALTH."[33]

Primacy was given to the existing laws. The Job Safety Act's coverage was specifically subordinated to the others.

The expansive wording of § 653(b)(1) is a further indication that Congress intended no contraction of the coverage of the existing laws. If the other Federal agency exercises authority to "prescribe *or* enforce," Congress said, then this Act does not apply. The prescribing or enforcing authority is for either "standards *or* regulations" which may be "affecting" job "safety *or* health."

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[33] 29 U.S.C. § 653(b)(1).

Had Congress intended the result the Commission is imposing today, it would have provided that this Act would apply to all employees

> Except Where Another Federal Agency Exercises Its Statutory Authority to Enforce Occupational Safety and Health Regulations.

We are told in the lead opinion that the Congressional policy of assuring safe workplaces for all "can only be effectuated by interpreting . . . [the Job Safety Act] to include rather than exclude working conditions of employees."

This pronouncement should come as a surprise to those who believed that the Atomic Energy Commission was best qualified to protect employees from radiation dangers or that the Department of Interior had similar know-how for use in protecting coal miners or the Federal Aviation Administration was well-equipped to protect the crew of commercial airliners from the hazards connected with plane crashes. Unfortunately, employees engaged in such endeavors and who have benefited from the protection of AEC, Interior and the FAA for many years are not told exactly why the Congressional purpose of assuring their safety "can *only* be effectuated" (emphasis supplied) by now substituting the Secretary of Labor for the agencies with particular expertise in the very specialized employments in which they work.

It is clear to me that Congress, in its wisdom, has exercised its legislative policy-making authority to create certain agencies of the executive branch for the purpose of regulating certain broad areas of our economy. This includes the three agencies used as an example in the preceding paragraph as well as the Federal Railroad Administration.

Can you separate responsibility for the safety of a train roaring down the track from that of the crew operating that train? Is it sensible to create an agency (the Federal Railroad Administration) and staff it with railroad experts in order to assure the public safety of those who use the trains but to then rule that responsibility for the safety of the employees of those railroads will be given over to an agency (the Department of Labor) which has no railroad experience at all?

Because I believe it is both senseless and contrary to law to so hold, I dissent from the Commission's decision holding this respondent liable for violating the Occupational Safety and Health Act of 1970. For the same reasons I concur with the view taken in the lead opinion on the recordkeeping charge.

The Commission, with this decision, has adopted a nook-and-cranny theory of safety regulation, i.e., if any Federal agency has not issued a regulation covering the configuration of toilet seats which are provided for empoyee use, for example, then the Department of Labor job safety standard on that subject will apply.[34] I do not believe that Congress intended a result that could lead to such absurdities. Congress recognized the railroad industry as a distinct segment of the economy and gave all regulatory power over that industry to the Department of Transportation and its Federal Railroad Administration.

The legislative history brings this out rather clearly. During the debates which preceded the passage of the Act, the following colloquy occurred in the House:

> Mr. Hathaway. I call to mind the coal mine safety bill which is not repealed by this bill. Yet, the rules and regulations under this act, as provided in the committee bill, could and should and would get into the

[34] 29 C.F.R. § 1910.141(c)(3)(ii).

area of coal mine health and safety and the metallic and nonmetallic mine safety act and the health and safety act—all three of these would continue to exist and there would be no reason why the health and safety rules promulgated under this act would not also apply to those industries.

MR. PERKINS. I would say to my distinguished colleague that he is incorrect in that statement because *all these various legislative acts as railway safety and mine safety are specifically exempted under section 22(b).* (emphasis supplied)

MR. ERLENBORN. I stand corrected .... Is it your understanding that present Federal laws providing authority to the executive agency to prescribe health and safety standards that are being exercised will then exempt that *industry* from the coverage of this act? (emphasis supplied) ....

MR. ERLENBORN. In other words, the mere existence of statutory authority does not exempt an industry? It is the exercise of that authority pursuant to the statute that does exempt it; is that correct?

MR. DANIELS of New Jersey. That is correct.

MR. ERLENBORN. I have one other question. This will certainly clear up any difficulty in interpreting this so far as the presently existing statutory authority presently being exercised.

Let me ask this question.

If presently existing statutory authority which is not presently being exercised at the time this bill goes into effect, but is then subsequently exercised; does that then at the time it is exercised *exempt an industry*? (emphasis supplied)

MR. DANIELS of New Jersey. At the time that that authority is exercised, *that industry will be exempt.* (emphasis supplied)

MR. ERLENBORN. So this does have a prospective effect. In other words, we are not going to interpret this language only as thought [sic] it were being interpreted as to conditions that exist on the day it becomes law, but it will have a prospective effect and the future exercise of authority will then *exempt an industry* from coverage under this law? (emphasis supplied)

MR. DANIELS of New Jersey. *The gentleman is absolutely correct.* (emphasis supplied)

116 CONG. REC. 38381 (November 23, 1970); *Legislative History of the Occupational Safety and Health Act of 1970* (hereinafter *Legislative History*), Subcommittee on Labor, Committee on Labor & Public Welfare, United States Senate, 92nd Congress, 1st session, p. 1019-1020.

Not only do these members of Congress refer again and again to an "industry" exemption, Congressman Perkins, Chairman of the Committee which reported the occupational safety and health bill to the House floor, answers unequivocally that the "rules and regulations under this Act" will not affect existing legislation. In the same answer he declares that "railroad safety" specifically is exempted by Section 22(b) [of H.R. 16785]. Section 22(b), changed only slightly in wording, not meaning, became § 653(b)(1).

The Federal Railroad Safety Act grants the Department of Transportation authority to prescribe "as necessary, appropriate rules, regulations, order and standards for all areas of railroad safety ... 45 U.S.C. § 431(a).

The authority to prescribe regulations "as necessary" would be meaningless if this Commission's nook-and-cranny theory applies, for the Secretary of Transportation is thereby deprived of the authority to determine that it is *not* necessary for railroad safety to regulate the configuration of toilet seats, for example. The power to regulate "as necessary" must include the authority to issue no regulations in such areas. To follow this Commission's reasoning to its logical conclusion would require a ruling that if the Secretary of Transportation did not deem such requirements necessary in the interests of railroad safety and the Secretary of Labor did think them necessary for employee safety, then the latter's judgment would prevail over the former's. Surely, if the Congress had intended such an unusual provision it would have been explicit in so stating.

Nevertheless, rather than consider the concrete evidence of congressional intent which the legislative history provides, the Commission finds that § 653(b)(1) must be narrowly interpreted in order to further the purposes of the Act.[35] Such reasoning presumes that Congress felt the Department of Labor alone was competent and could be trusted to effectively promote occupational safety and health. I find such reasoning arrogant and patently unjustifiable. Congress has consistently entrusted the Department of Transportation (and its predecessors) with full jurisdiction over the railroads. There is nothing in the legislative history which would supply any reason why Congress would take jurisdiction from one agency with long-standing expertise in a particular industry and give

[35] I do not see that the Department of Transportation's support of the Secretary of Labor's interpretation of § 653(b)(1) is relevant. Jurisdiction of agencies is defined by statute, not by agreement between them. It is therefore our duty to resolve the question on the basis of what was legislated by Congress, not by what two departments *wish* Congress had done and what arrangement might be more convenient for their own interests.

it to another, with none. Indeed, that history is exactly to the contrary.

It is my opinion that Congress envisioned a comprehensive program for employee safety under which the Department of Labor would have jurisdiction over those industries not under the regulatory authority of some other Federal agency. In furtherance of this purpose Congress enacted the Federal Railroad Safety Act on October 16, 1970. On October 30, 1970, it adopted the Rail Passenger Service Act and, less than 2 months thereafter, it adopted the Occupational Safety and Health Act of 1970. It was signed into law on December 29, 1970. Certainly Congress was aware of the interrelationships created by these statutes and intended them to work as a whole. To justify a broad interpretation of § 653(b)(1) because the Act is "humanitarian" or "remedial" implies that it is "more humanitarian" or "more remedial" than the other acts.[36]

In passing the laws referred to above (as well as others not referred to in this opinion), Congress enacted specific legislation for railroad safety (and for airplane safety, coal mine safety, nuclear energy safety, etc.). It intended to treat railroad safety differently and by including § 653 (b)(1) as part of the Job Safety Act it exempted that Act's coverage from the railroad safety arrangement it had already created.

The lead opinion makes reference to the provision of the Rail Passenger Service Act which excluded the application of certain Department of Labor safety standards to rail-

[36] Query whether a law intended to achieve public safety is more or less "humanitarian" or "remedial" than one designed to accomplish worker safety. The attempt to apply such a rule of construction in this situation is not only meaningless because of this problem but because § 653(b)(1) is not an "exemption" or "exception" of persons covered by other acts. As indicated at an earlier point in this opinion, the coverage of the other acts is given primacy and the coverage under the Job Safety Act is subordinated thereto.

road employees,[37] but it ignored the significance of the inclusion of that exclusion. Respondent raised this reference in its argument on this case, not because it thought that the exclusion had any applicability here, but because it is further evidence of congressional intent. The reason Congress excluded railroad employees was because Congress had confidence in the Department of Transportation, and knew that all railroad safety was already under the jurisdiction of that Department and it wanted to be sure it remained there.

A further demonstration of congressional intent to leave all aspects of railroad safety under the jurisdiction of the Department of Transportation was included in the Conference Report on the Amtrak Improvement Act of 1973, 45 U.S.C. § 502, wherein it was stated that:

> The Federal Railroad Safety Act of 1970, enacted only two weeks prior to the Rail Passenger Service Act, defined the Secretary of Transportation's jurisdiction over railroad safety to include "all areas of railroad safety." It is the intent of the Committee of conference to make clear that *the Secretary's jurisdiction over railroad safety is exclusive.* 93rd Congress, 1st Session, H.R., Report No. 93-587.

Perhaps the most troublesome matter in this case results from the sheer volume of occupational safety and health standards which have been promulgated by the Secretary of Labor pursuant to the authority given him in the Job Safety Act. It is estimated that it would take 1,400 typewritten pages to copy them, plus an additional 2,000 pages to type out all the regulations which apply but were not printed in the Federal Register because of an incorporation-by-reference referral to other documents. The regu-

[37] It should be noted that there was a work safety law applicable to the construction industry which was administered by the Department of Labor and which pre-dated the enactment of the Job Safety Act. See 40 U.S.C. § 333. The exclusion in the Rail Passenger Act was from that law.

lations cover every conceivable aspect of human endeavor including the configuration of toilet seats,[38] the disposal of used hand towels,[39] the placement of fire extinguishers,[40] the amount of noise [41] and toxic chemicals to which an employee may be exposed,[42] and the color of fire exit signs.[43] Perhaps, in anticipation of the outcome of this case the regulations even specify what must be done during the loading and unloading of railroad cars.[44]

To read all the regulations would take days. To understand their full meaning and applicability is probably an impossible task even if one takes the time to read all the decisions of this Commission (which now cover more than 10 volumes of published material). Of course, no employer covered by this law needed to do all of this prior to the issuance of this decision. He could locate those matters applicable to his particular business or industry through an index to the regulations and would not have to concern himself with the others.

However, because of the nook-and-cranny theory which is announced in this decision employers in the railroad industry must become familiar with all Department of Transportation railroad safety regulations, then they must figure out what has *not* been covered thereby. They must then look to the Labor Department's occupational safety and health standards to discover how these gaps in the railroad safety regulations are filled. Because of the flexible and obscure language employed in some such standards,[45] few

[38] 29 C.F.R. § 1910.141(c)(3)(ii).

[39] 29 C.F.R. § 1910.141(d)(3).

[40] 29 C.F.R. § 1910.157.

[41] 29 C.F.R. § 1910.95.

[42] 29 C.F.R. § 1910.93.

[43] 29 C.F.R. §1910.144(a)(1)(i)(d).

[44] 29 C.F.R. § 1910.178(k)(2).

[45] See, for example, 29 U.S.C. § 1910.242(a) and 29 U.S.C. § 1910.132(a).

such employers will be able to ascertain the applicability of the various regulations with any preciseness.

Difficulties of this kind will also affect the various inspectors and others who are responsible for seeing that the safety requirements are observed. Under such circumstances it is very unlikely that the intended purpose of the Job Safety Act can be fully realized or the intended beneficiaries of the law fully protected.

The concept of "working conditions" is elusive. Complainant takes the position that it refers to any specific hazard to workers. A reasonable application of that term, therefore, would include anything that could be classified as hazardous. It is difficult to think of anything that could not—at some time or other—be so classified whether it be an employee's hours of work, state of mind, age, or his personal feelings about how his employer and fellow employees treated him.

I mention the foregoing merely to indicate the pandora's box which the Commission has opened today. The decision also leads one to the inescapable conclusion that—in the opinion of two members of this Commission—Congress had no sense of order and intended to create confusion of the sort described. I don't share such a view. I am of the opinion that Congress intended to create a workable system to improve occupational safety and health and that they were wise enough to leave all aspects of safety in the railroad industry in the hands of the railroad experts in the Department of Transportation.[46]

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[46] A clear indication that Congress intended no changes in the existing laws by its adoption of the Job Safety Act comes from the remarks of Senator Williams, the Act's principal Senate sponsor. During debate on Noxember 16, 1970, just prior to a favorable Senate vote on the bill which was enacted, he stated:

> "There has been no description here that I have heard of the failure of any of these programs, whether it is construction safety, railway safety, or coal mine safety."

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130

January 25, 1977

Mr. Malcolm R. Maclean
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Savannah, GA 31402

No. 74-3984—Seaboard Coast Line Railroad Co.
v. W. J. Usery, Jr., Et Al.

Mandate Stayed to and Including February 24, 1977

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38 LW 3502). A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated

as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*
By /s/ MARY BETH BREAM
Deputy Clerk

enc.
cc: Mr. John B. Norton
Mr. Allen H. Feldman
Mr. William McLaughlin
Mr. Lawrence M. Mann
Mr. Edward J. Hickey, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

74-3984

SEABOARD COAST LINE RAILROAD COMPANY, *Petitioner*,

versus

W. J. USERY, JR., Secretary of Labor and Occupational Safety and Health Review Commission, *Respondent*.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (Georgia Case)

Order

(Filed February 24, 1977)

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including

....., the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(x) The motion for a further stay of the issuance of the mandate is GRANTED to and including April 10, 1977, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ THOMAS GIBBS GEE
United States Circuit Judge